IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE R.BASANT

TUESDAY, THE 9TH JANUARY 2007 / 19TH PAUSHA 1928

Crl.MC.No. 1831 of 2006()

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CC.176/2004 of CHIEF JUDL.MAGISTRATE, ERNAKULAM

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PETITIONER: ACCUSED 1 & 2

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1. V.M.HABEEBULLA, S/O. V.P.MOHAMMED,
   AGED 52 YEARS, VADAKKAYIL HOUSE,
   ACHENKAVALA, MADAKKATHANAM P.O., THODUPUZHA.

2. REAZ V.H., S/O. V.M.HABEEBULLA,
   AGED 30 YRS, VADAKKAYIL HOUSE,
   ACHENKAVALA, MADAKKATHANAM P.O.,
   THODUPUZHA.

BY ADV. SRI.K.GOPALAKRISHNA KURUP

RESPONDENTS: STATE & DEFACTO COMPLAINANT

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1. STATE OF KERALA, REP. BY THE
   PUBLIC PROSECUTOR,
   HIGH COURT OF KERALA, ERNAKULAM.

2. JOSEPH PRAKASH, S/O. FRANCIS,
   THONIKUZHIYIL, THUDAGANATTU KARA,
   MUTTAM VILLAGE, THODUPUZHA.

BY ADV. SRI.SOJAN MICHEAL
PUBLIC PROSECUTOR SRI.K.A.AKBAR

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 09/01/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**R.BASANT, J**

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**Crl.M.C.No.1831 of 2006**

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Dated this the 9th day of January, 2007

**ORDER**

The petitioners are accused 1 and 2 in a prosecution under Section 406 and 420 read with 120 B I.P.C. They have come to this Court with a prayer that the prosecution initiated against them may be quashed by invoking the powers under Section 482 Cr.P.C.

2. Brief reference to facts may be necessary in the matter. The defacto complainant alleged that he had entered into an agreement with the 1st accused on 26.02.2003 regarding sale of land along with a match factory. The total sale consideration was allegedly fixed at Rs.48 lakhs. An amount of Rs.47 lakhs had allegedly been paid prior to that date. The balance of Rs.1 lakh was liable to be paid. There was some disagreement between the parties later and the agreement did not actually come into effect. It is the case of the defacto complainant that on 18.03.03, he was fraudulently deceived to go to the accused who were waiting for him near his bank at Ernakulam and handover the original of the said agreement dt.26.02.03. He was deceived to believe that the original document must be handed over to enable the accused persons to raise amounts on loan from the bank. The defacto complainant was allegedly deceived and he actually went to the scene of the crime with the

document. But according to him, the document was snatched away from his possession and it was torn and destroyed by the accused. No complaint appears to have been filed on 18.03.2003 or shortly thereafter. Long later, on 29.10.03, a private complaint was filed before the Magistrate raising the above said allegations. The learned Magistrate referred the complaint to the police under Section 156(3) Cr.P.C. The police registered Crime No.838/2003 of Central Police Station, Cochin City under Sections 390, 406, 420, 421, 423, 425, 464, 477 & 120 B read with Section 34 I.P.C. Investigation was conducted by the police and long later, they filed the final report raising allegations against the petitioners only under Section 120 B, 406 and 420 read with 34 I.P.C.

3. The learned counsel for the petitioners submits that the allegations are inherently improbable and unworthy of acceptance. The delay in filing the complaint, the embellishments which have now been brought about as also the fact that the police after investigation has found a substantial portion of the allegations unacceptable (ie. the allegations regarding forcible snatching away of the original agreement)must persuade this Court to invoke its powers under Section 482 Cr.P.C to bring to premature termination this unworthy prosecution, it is contended. At least further investigation under Section 173 (8) may be ordered, it is prayed.

4. I have heard the learned counsel for the petitioners. I am of opinion that It is for the petitioner to appear and raise their contentions before the learned Magistrate and claim discharge under Section 239 Cr.P.C. The learned counsel for the petitioners has advanced detailed arguments on the basis of the probabilities in the case. He raises a further contention that on admitted facts, the allegations under Section 406 and 420 I.P.C cannot simultaneously co-exist.

5. Having considered all the relevant inputs, I am satisfied that this is a fit case, where the petitioners must be directed to raise those contentions before the learned Magistrate and claim discharge under Section 239 Cr.P.C.

6. The learned counsel for the petitioners submits that the petitioners will be put to unnecessary harassment and vexation if personal presence of the petitioners were insisted by the learned Magistrate on all dates of postings. The petitioners have already entered appearance, it is submitted. I am certainly of the opinion that the petitioners can be permitted to appear through counsel till a decision is taken on the question of charge. They shall be entitled to apply for exemption before the learned Magistrate.

7. In the result, this Crl.M.C is, dismissed. But with the specific observation that the petitioners shall be entitled to appear through counsel and advance their arguments claiming discharge

under Section 239 Cr.P.C. The learned Magistrate shall take appropriate decision in the matter under Section 239/240 Cr.P.C.

(**R.BASANT, JUDGE**)

rtr/